

JEFFER MANGELS BUTLER & MITCHELL LLP  
ROBERT B. KAPLAN, P.C.  
(Bar No. 76950)  
NICOLAS DE LANCIE  
(Bar No. 84934)  
Two Embarcadero Center, Fifth Floor  
San Francisco, California 94111-3813  
Telephone: (415) 398-8080  
Facsimile: (415) 398-5584  
  
Attorneys for Secured Creditor  
WELLS FARGO BANK, N.A.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re  
MI PUEBLO SAN JOSE, INC.,  
Debtor and Debtor-in-Possession.

CASE NO. 13-53893-ASW

Chapter 11

**OBJECTION TO APPLICATION BY  
PACIFIC MEAT COMPANY FOR  
ALLOWANCE AND PAYMENT OF  
CHAPTER 11 ADMINISTRATIVE CLAIM  
UNDER BANKRUPTCY CODE § 503(b)(9)  
AND REQUEST FOR HEARING**

Date: September 10, 2013  
Time: 3:00 p.m.  
Place: Courtroom 3020  
280 South First Street  
San Jose, California

**TO: THE HONORABLE ARTHUR S. WEISSBRODT, BANKRUPTCY JUDGE,  
PACIFIC MEAT COMPANY, ITS ATTORNEYS OF RECORD AND OTHER  
PARTIES-IN-INTEREST:**

PLEASE TAKE NOTICE that Wells Fargo Bank, National Association ("Bank")  
hereby objects (the "Objection") to the Application for Allowance and Payment of Chapter 11  
Administrative Expense Under Bankruptcy Code § 503(b)(9) filed by Gaukel Enterprises, Inc. d/b/a  
Pacific Meat Company on August 7, 2013 (the "Application") [Docket No. 112] and requests that a

1 hearing take place on the Bank's Objection on September 10, 2013 at 3:00 p.m. in the above-entitled  
2 Court pursuant to the terms of that certain Notice of Hearing on (1) Application by Pacific Meat  
3 Company for Allowance and Payment of Chapter 11 Administrative Expense Under Bankruptcy  
4 Code § 503(b)(9); (2) Wells Fargo Bank's Opposition Thereto; and (3) Opportunity for Hearing by  
5 Other Parties on Said Application which was filed on August 12, 2013 [Docket No. 127].

### 6 INTRODUCTION

7 Pacific Meat Company seeks allowance and payment of its administrative claim  
8 pursuant to 11 U.S.C. § 503(b)(9) ("503(b)(9) Claim"). Pursuant to the Procedures Order (as that  
9 term is defined below), Mi Pueblo San Jose, Inc. ("Debtor") delivered a Claim Package to the Bank  
10 at 5:20 p.m. on August 28, 2013 requesting the Bank consent to the allowance and payment of the  
11 Pacific Meat Company 503(b)(9) Claim which the Bank is required to respond to pursuant to the  
12 Procedures Order by 5:20 p.m. on September 3, 2013. The Bank will advise this Court in a  
13 supplemental pleading to be filed after the date of this Objection whether the Bank consents to the  
14 **allowance** of the Pacific Meat Company 503(b)(9) Claim. However, the Bank will not consent to  
15 the **payment** of the Pacific Meat Company 503(b)(9) Claim.

16 There is no provision in the Bankruptcy Code that requires immediate payment of  
17 the Pacific Meat Company 503(b)(9) Claim. The timing of payment of administrative claims  
18 asserted under 11 U.S.C. § 503(b)(9) is within the discretion of the Bankruptcy Court, and many  
19 courts have denied requests for immediate payment of claims under section 503(b)(9) because to do  
20 so destroys the goal of an orderly and equal distribution among creditors once a bankruptcy is filed,  
21 and starts a race to the debtor's assets. Other courts consider the prejudice to the debtor, the  
22 hardship to the claimant, and the potential detriment to other creditors in determining whether  
23 claims asserted under section 503(b)(9) should be paid immediately. Further, where a claimant is  
24 seeking payment of a claim under section 503(b)(9) from a secured creditor's cash collateral, many  
25 courts have taken the position that such payments cannot be made without the secured creditor's  
26 consent, especially where the claimant seeking payment is **not a critical vendor**, necessary for a  
27 debtor's reorganization. Finally, other courts look to the expense and length of a bankruptcy case's  
28 administration, before ordering that claims asserted under section 503(b)(9) should be paid

1 immediately.

2 All of the factors set forth above militate against the immediate **payment** of the  
3 Pacific Meat Company 503(b)(9) Claim for a number of reasons.

4 First, the Application fails to disclose to this Court that the Debtor is in fact doing  
5 significant business with Pacific Meat Company and recently paid Pacific Meat Company in excess  
6 of \$164,000 for the purchase of product. Since Pacific Meat Company still continues to do business  
7 with the Debtor, it clearly cannot be considered a critical vendor whose 503(b)(9) Claim must be  
8 paid now in order for the Debtor to remain in business.

9 Second, even though the Debtor's bankruptcy case is over five weeks old and the  
10 Debtor has not paid a single claim asserted under section 503(b)(9), the Debtor remains in business.

11 Third, the Procedures Motion (as that term is defined below) filed by the Debtor  
12 stated that potential claims under section 503(b)(9) were in excess of \$8,500,000. In addition, the  
13 bankruptcy schedules recently filed by the Debtor state that the Debtor has unsecured creditors in  
14 excess of \$35,000,000. The Application fails to address the issue of why potential administrative  
15 claims under section 503(b)(9) should be paid now, in light of the substantial amount of unsecured  
16 creditors who will need to wait months or years to be paid.

17 Fourth, the Application contains no analysis of the financial impact on the Debtor if  
18 it was required to make payment of all claims asserted under section 503(b)(9) of approximately  
19 \$8,500,000. Payment of Pacific Meat Company's 503(b)(9) Claim would cause a "run on the  
20 Debtor's assets", and the Debtor simply does not have cash available to pay all of its  
21 section 503(b)(9) claims. The weekly financial reporting provided by the Debtor to the Bank  
22 indicates that the Debtor's cash receipts are weak, has not achieved its projected cash receipts for the  
23 weeks ending August 4, 2013, August 11, 2013, August 18, 2013 and August 25, 2013, and **has**  
24 **sales which are cumulatively under its projection by approximately \$4,750,000 for these**  
25 **weeks.** In addition, the financial reporting projects that the Debtor will have an ending cash balance  
26 as of October 6, 2013 of only approximately \$6,400,000. In light of the foregoing, how can the  
27 Debtor make payment immediately to section 503(b)(9) claims which are in excess of \$8,500,000?  
28 Moreover, the cash collateral budget for the approximate four-week period ending October 6, 2009

1 submitted by the Debtor to the Bank which has been approved, contains line items for the payment  
2 of professional fees of \$325,000 **for this short period of time**. Thus, as this Court has noted, the  
3 administrative claims of the Debtor arising post-petition which are required to be paid on a regular  
4 basis are significant and it is inappropriate for the almost \$8,500,000 in pre-petition administrative  
5 claims arising under section 503(b)(9) to be paid now.

6 In light of the foregoing, and the fact that the outstanding obligations owed by the  
7 Debtor to the Bank are an amount in excess of \$26,000,000 according to the Debtor's bankruptcy  
8 schedules, it is inappropriate at this early stage of the Debtor's case to order payment of Pacific  
9 Meat Company's 503(b)(9) Claim. This is especially the case as related debtor Cha Cha  
10 Enterprises, LLC ("Cha Cha") has taken the position that certain additional collateral obtained by  
11 the Bank to secure repayment of the obligations owed by the Debtor to the Bank is "avoidable."  
12 Until such time as all of the issues set forth above are sorted out, including the scope of the Bank's  
13 liens, there should be no payment to Pacific Meat Company on account of its 503(b)(9) Claim from  
14 the Bank's cash collateral.

## 15 STATEMENT OF FACTS

### 16 A. Procedural History

17 As is more specifically set forth in the accompanying Declaration of Robert B.  
18 Kaplan in support of the Bank's Objection ("Kaplan Decl."), on July 24, 2013, this Court signed that  
19 certain Order (I) Granting Administrative Expense Status to Debtor's Undisputed Obligations to  
20 Vendors Arising Form Post-Petition Delivery of Goods Ordered Pre-Petition and Authorizing  
21 Debtor to Pay Such Obligations in the Ordinary Course of Business; (II) Authorizing Payment for  
22 Goods Received Within 20 Days of Filing and Establishing Administrative Claims Bar Date for  
23 Section 503(b)(9) Claims; and (III) Establishing Procedures to Allow Claims of Perishable  
24 Agricultural Commodities Act and Packers and Stockyard Act Claimants ("Procedures Order").  
25 The Procedures Order established a procedure for the Debtor to review claims for payment made by  
26 the Debtor's vendors pursuant to the Perishable Agricultural Commodities Act, the Packers and  
27 Stockyard Act and pursuant to 11 U.S.C. § 503(b)(9). Kaplan Decl., ¶ 2, Exhibit 1. Section 3 of the  
28 Procedures Order approved a procedure to identify and resolve section 503(b)(9) claims pursuant to

1 paragraph 14 of the Motion for Order (I) Granting Administrative Expense Status to Debtor's  
2 Undisputed Obligations to Vendors Arising From Post-Petition Delivery of Goods Ordered Pre-  
3 Petition etc. which was filed on July 22, 2013 [Docket No. 13] ("Procedures Motion").

4 Section 6 of the Procedures Order provides as follows:

5 6. **Prior to payment of any claim under Bankruptcy Code**  
6 **section 503(b)(9) PACA or PSA pursuant to this Order**, Mi Pueblo  
7 shall deliver to WFB and its counsel, Robert B. Kaplan, Esq. and  
8 Nicolas De Lancie, Esq., via electronic mail the invoices, proof of  
9 delivery, summary of the foregoing, dates of delivery and any other  
10 documents Mi Pueblo deems appropriate (each a "Claim Package").  
11 WFB shall have three business days after the date of its receipt of  
12 each Claim Package to review the documentation supplied. If WFB  
13 does not object to payment of the claim that is the subject of the  
14 Claim Package within the specified time period by delivering its  
15 objection to the Claim Package by electronic mail to Mi Pueblo's  
16 counsel, Robert G. Harris, Esq. or Wendy Smith, Esq., Mi Pueblo  
17 may pay that claim. If WFB does object to payment of the claim, and  
18 the parties are unable to resolve the objection through negotiation,  
19 then Mi Pueblo shall set a hearing on not less than 20 calendar days'  
20 notice on WFB's objection, WFB shall file and serve its objection and  
21 any supporting authorities and evidence (the "WFB Brief") on Mi  
22 Pueblo and the claimant within 5 calendar days of the date of its  
23 objection. Mi Pueblo and the claimant shall file and serve any  
24 response to said objection not later than 5 calendar days after service  
25 of the WFB Brief. (Emphasis added.)

26 On August 7, 2013, Pacific Meat Company filed its Application. Kaplan Decl., ¶ 7,  
27 Exhibit 7. Thereafter, on August 9, 2013, the Bank filed its Opposition to the Pacific Meat  
28 Company Application, Kaplan Decl., ¶ 7, Exhibit 8, in part on the grounds that no payment could be  
made by the Debtor to Pacific Meat Company **because no Claims Package** relating to the payment  
of Pacific Meat Company's claim under 11 U.S.C. § 503(b)(9) had been submitted to the Bank  
pursuant to section 6 of the Procedures Order.

As is set forth in detail in the Kaplan Decl., ¶¶ 4, 5, 6, 8 and 10, prior to the filing of  
the Pacific Meat Company Application, the Debtor had not submitted a Claim Package to the Bank  
requesting allowance and payment to the Bank requesting payment of Pacific Meat's 503(b)(9)  
Claim. However, during the late afternoon of August 28, 2013, the Bank finally received a Claim  
Package from Mi Pueblo requesting allowance and payment of Pacific Meat Company's 503(b)(9)  
Claim. The Bank's response thereto is due the late afternoon of September 3, 2013, and the Bank  
will, next week, file a supplemental pleading in connection with this Opposition stating whether or

1 not the Bank objects to the allowance of the Pacific Meat Company 503(b)(9) Claim.

2 On August 12, 2013, Pacific Meat Company filed a Notice of Hearing on  
3 (1) Application by Pacific Meat Company for Allowance and Payment of Chapter 11  
4 Administrative Expense Claim under Bankruptcy Code Section 503(b)(9); (2) Wells Fargo Bank's  
5 Opposition Thereto; and (3) Opportunity for Hearing by Other Parties on Said Application. Kaplan  
6 Decl., ¶ 9, Exhibit 11.

7 **B. The Debtor's Financial Condition**

8 As this Court is well aware, the Debtor's Chapter 11 case has numerous creditors  
9 who are owed large amounts of money. The Debtor's Schedule E –Creditors Holding Unsecured  
10 Priority Claims [Docket No. 146] states those liabilities are approximately \$4,800,000, while the  
11 Debtor's Schedule F – Creditors Holding Unsecured Nonpriority Claims [Docket No. 146] states  
12 those liabilities are approximately \$34,550,000. Moreover, Debtor's Schedule D – Creditors  
13 Holding Secured Claims [Docket No. 146] states that the outstanding obligations owed to the Bank  
14 and other secured creditors are in excess of \$29,000,000.

15 Prior of the filing of the Debtor's bankruptcy case, the Bank obtained additional  
16 collateral from Cha Cha to secure repayment of the outstanding obligations owed by the Debtor to  
17 the Bank. In its Memorandum of Points and Authorities in Support of Emergency Motion for an  
18 Order Interim Use of Cash Collateral and Scheduling a Final Hearing Pursuant to Bankruptcy  
19 Rule 4001 filed on July 22, 2013 in the Chapter 11 case entitled In re Cha Cha Enterprises, LLC,  
20 Case No. 13-53894 ("Cha Cha Emergency Motion") [Docket No. 312], Cha Cha stated in  
21 paragraph 10 which appears on pages 4 and 5 that the additional security interests obtained by the  
22 Bank prior to this bankruptcy filing "are avoidable."<sup>1</sup>

23 The Procedures Motion was supported by the Declaration of Juvenal Chavez which  
24 stated in paragraph 7 that the total amount of claims which could be asserted against the Debtor  
25 pursuant to Bankruptcy Code § 503(b)(9) could be as "high as \$8,465,068." Paragraph 7 of  
26 Mr. Chavez' Declaration further stated in a conclusory fashion without any evidence that the Debtor

27 <sup>1</sup> Needless to say, the Bank disagrees with this contention.  
28



believed it was "essential that these creditors . . . continue to be paid in the ordinary course of business in order to allow for its business and operations to continue" and further estimated that **there were 168 vendors in this category.**

As is more specifically set forth in the accompanying Declaration of Currie Butzbaugh in support of the Bank's Objection ("Butzbaugh Decl."), although Pacific Meat Company's 503(b)(9) Claim has not been paid, since the date of the Debtor's bankruptcy filing on July 22, 2013, the Debtor has made payments to Pacific Meat Company on account of post-petition date sales of product made by Pacific Meat Company to the Debtor in the amount of \$166,000. Butzbaugh Decl., ¶ 4, Exhibit 1. In addition, financial reporting provided by the Debtor to the Bank indicates that the Debtor's sales for the weeks ending August 4, 2013, August 11, 2013, August 18, 2013 and August 25, 2013 are approximately \$4,700,000 less than originally projected on a cumulative basis, as summarized in the chart which follows (Butzbaugh Decl., ¶¶ 5 and 6, Exhibits 2 and 3):

Week Ending	Projected Cash Receipts	Actual Cash Receipts	Cash Shortfall
August 4, 2013	\$8,813,000	\$6,970,694	\$1,842,306
August 11, 2013	\$7,924,000	\$7,517,041	\$406,959
August 18, 2013	\$8,346,000	\$6,857,416	\$1,488,584
August 25, 2013	\$7,577,000	\$6,556,011	\$1,020,989
<b>Total Cash Shortfall:</b>			<b>\$4,758,838</b>

Moreover, the Cash Forecast provided by the Debtor to the Bank on April 28, 2013 indicates that the Debtor's cash **will decrease** by \$4,106,633 between the week ending September 1, 2013 and October 6, 2013, *i.e.*, \$10,577,417–\$6,470,784. Butzbaugh Decl., ¶ 7, Exhibit 4. In addition, and equally significantly, the Cash Forecast states that the Debtor **will only have cash on hand for the week ending October 6, 2013 of \$6,470,784.** Butzbaugh Decl., ¶ 7, Exhibit 4.

# 1.

## **THE LAW GOVERNING THE PAYMENT OF CLAIMS ASSERTED UNDER 11 U.S.C. § 503(b)(9)**

One of the new provisions added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was 11 U.S.C. § 503(b)(9), which states as

1 follows:

2 (b) After notice and a hearing, there shall be allowed  
3 administrative expenses, other than claims allowed under section  
4 502(f) of this title including – . . .

5 (9) the value of any goods received by the debtor within 20 days  
6 before the date of commencement of a case under this title in which  
7 the goods have been sold to the debtor in the ordinary course of such  
8 debtor's business.

9 The court in In re Bookbinders' Restaurant, Inc., 2006 WL 3858020 (Bankr. E.D. Pa.  
10 2006) stated as follows with respect to the enactment of section 503(b)(9):

11 Section 503(b)(9) effectively converted what previously was a  
12 prepetition 'claim' into an allowable administrative expense (footnote  
13 omitted). This new status provides at least two benefits to holder of  
14 an administrative expense allowed under § 503(b)(9). First, the  
15 allowed expense must be paid in full as a condition of confirmation of  
16 a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A) . . . . Previously,  
17 the same liability was treated as a prepetition claim that could be  
18 classified in a plan of reorganization, was subject to plan voting and  
19 was susceptible to being paid only partially in a plan confirmed over  
20 the creditor's dissent . . . . The second possible benefit to the creditor  
21 is that there is a potential for a more prompt payment of "the 20 day"  
22 liability. Since the liability is an administrative expense and not a  
23 prepetition claim, a chapter 11 debtor **with adequate resources** can  
24 pay the allowed administrative expense prior to confirmation.  
25 (Emphasis added.) 26 WL3858020 at \*3.

26 Neither Bankruptcy Code section 503(a) nor Bankruptcy Code section 503(b)  
27 provides explicit guidance to the Bankruptcy Court as to when an allowed administrative expense  
28 claim should be paid. In Bookbinders, the court stated as follows with respect to when an  
administrative expense claim must be paid in a Chapter 11 case:

1 The considerations which guide a court's decision whether to order  
2 immediate payment of an allowed administrative expense have been  
3 described in different ways. In *Dieckhaus Stationers*, the court stated  
4 its discretion should be exercised "with reference to other provisions  
5 and policies of the Code". 73 B.R. at 972. Other courts have been  
6 more specific. In *HQ Global Holdings*, the court stated that the court  
7 should consider "bankruptcy's goal of an orderly and equal  
8 distribution among creditors and the need to prevent a race to a  
9 debtor's assets." 282 B.R. at 173 . . . . [I]n *In re Garden Ridge*  
10 *Corporation*, the court stated it would consider 'prejudice to the  
11 debtor, hardship to the claimant, and the potential detriment to other  
12 creditors.' 323 B.R. at 143. 2006 WL3858020 at \*4.



1 In Bookbinders, the court rejected the contention made by a claimant that it was  
2 entitled to immediate payment of its allowed expense claim under section 503(b)(9):

3 There is nothing in the language of § 503(b)(9) to support [the  
4 creditor's] suggestion that it is entitled to immediate payment of its  
5 allowed expense **in derogation of the accepted principle that the  
6 timing of payment of an allowed administrative expense is within  
7 the court's discretion.** Section 503(b)(9) does nothing more than  
8 define a type of liability, previously treated as a prepetition claim,  
9 which is now accorded administrative expense status. **The text of  
§ 503(b)(9) neither states nor even implies that allowance of the  
expense encompasses an unqualified right to immediate payment.**  
Nor does the text of the provision suggest that an administrative  
expense allowed under § 503(b)(9) is to be treated in a more favorable  
manner than other allowed § 503(b) administrative expense.  
(Emphasis added.) 2006 WL 3858020, at \*4.

10 Finally, the court in Bookbinders rejected the claimant's contention that since  
11 post-petition creditors were being paid in the ordinary course of business for goods and services  
12 provided, a section 503(b)(9) administrative expense claimant must also be paid in the same  
13 manner. The Court noted that post-petition payments to trade creditors were being paid pursuant to  
14 the provisions of Bankruptcy Code § 363(c)(1), which allows a debtor in possession to enter into  
15 transactions, including the sale or lease of property of the estate, "in the ordinary course of  
16 business," without notice or a hearing, and [to] use property of the estate in the ordinary course of  
17 business without notice or a hearing."

18 In deciding whether immediate payment of section 503(b)(9) claims is appropriate,  
19 bankruptcy courts must consider (i) the prejudice to the debtor, (ii) the hardship to section 503(b)(9)  
20 claimants, if any, and (iii) the detriment to other creditors. See e.g., In re Garden Ridge Corp., 323  
21 B.R. 136, 143 (Bankr. D. Del. 2005). Additionally, in making a determination as to when  
22 administrative claimants must be paid, one of the chief factors the courts consider is bankruptcy  
23 goals of an orderly and equal distribution among creditors and need to prevent a race to the debtor's  
24 assets. In re Baptist Medical Center of New York, Inc., 52 B.R. 417, 421 (E.D.N.Y. 1985). Other  
25 factors the Court must look to are whether the estate may be able to pay all **administrative**  
26 **expenses** in full, In re Standard Furniture, 3 B.R. 527, 532 (Bankr. S.D. Cal. 1980), and the length  
27 and expense of a bankruptcy case's administration. In re Reams Broadcasting Corp., 153 B.R. 520,  
28 522 (Bankr. N.D. Ohio 1993); In re Barron, 73 B.R. 812, 814 (Bankr. S.D. Cal. 1987).

1                    Additionally, in In re Arts Dairy, LLC, 414 B.R. 219 (Bankr. M.D. Ohio 2009), the  
2 Court refused to order payment of a section 503(b)(9) claim over secured creditor's objection and  
3 initially stated as follows:

4                    When considering the propriety of authorizing an immediate payment  
5 to an administrative claimant, courts generally weigh three factors:  
6 (a) prejudice to the debtor; (b) hardship to the claimant; and  
7 (c) potential detriment to other creditors. (citations omitted) Id. at  
8 221.

9                    Furthermore, the Arts Court explained that where the administrative claimant is seeking payment  
10 from a **secured creditor's** collateral, additional considerations apply:

11                    **Bankruptcy law has codified the long-standing and well-**  
12 **established priority scheme whereby secured debts are generally**  
13 **entitled to be paid ahead of unsecured debts, and unsecured debts**  
14 **are entitled to a distribution of a debtor's assets ahead of the**  
15 **holders of equity interests.** (citation omitted) Based upon the  
16 Bankruptcy Code's priority scheme, the Supreme Court of the United  
17 States elucidated that, unless otherwise authorized by the Code,  
18 administrative expenses in bankruptcy, being unsecured debts, do not  
19 take priority over secured claims. Hartford Underwriters Ins. Co. v.  
20 Union Planters Bank, N.A., 530 U.S. 1, 5 . . . In this matter, AgStar  
21 Financial Services claims first priority mortgage liens and security  
22 interests in substantially all of the Debtor's assets – including cash  
23 proceeds, otherwise known as cash collateral. No party has been able  
24 to identify to the Court a source of funds, outside AgStar's interest in  
25 cash collateral, which would be presently available to pay the  
26 Claimants their administrative claim. The use of AgStar's cash  
27 collateral will, therefore, be necessary to pay the Claimants their  
28 administrative claim.

                    Pursuant to § 363(c)(2), however cash collateral may only be used to  
pay obligations of the debtor if either (1) the entities with an interest  
in the collateral consent to its use, or (2) the court authorizes its use.  
In this matter, the first prerequisite to the use of cash collateral is not  
applicable, with AgStar strongly objecting to the payment of the  
Claimants' administrative expense . . . Id. at 222. (Emphasis added.)

                    Finally, the Arts Court further held there was no compelling reason why the section  
503(b)(9) claimant needed to be paid immediately, especially since the claimant had not established  
it was a "critical vendor":

                    First, there is no compelling reason showing that the  
Claimants . . . should be afforded favorable treatment over other  
similarly situated creditors. The Debtor, for example, did not identify  
the Claimants as a critical vendor, necessary for its reorganization  
(footnote omitted).

1 Second, nothing in this Court's prior order authorizing the use of cash  
2 collateral contemplates that administrative expenses would be  
immediately paid. . .

3 For these reasons, the Claimants . . . have failed to establish that they  
4 are entitled to the immediate payment of their administrative claim.  
5 Consequently, while they will be allowed an administrative claim for  
\$3,895.10, the Claimants will only become entitled to receive  
6 payment on their claim when all other similarly situated claims also  
become entitled to receive payment. Id. at 222-223.

7 Finally, as noted above in the Arts decision, this Court needs to keep in mind the  
8 decision of the Supreme Court in Hartford Underwriters Insurance Company v. Union Planters  
9 Bank, N.A. (2000) 530 U.S. 1. In Hartford, the United States Supreme Court held that the  
10 Bankruptcy Code does not provide an administrative claimant an independent right to seek payment  
11 of its claim from property encumbered by a secured creditor's lien under section 506(c). Under  
12 11 U.S.C. § 506(c) in this regard, it stated as follows:

13 On the other side of the ledger, petitioner's reading would lead itself  
14 to results that seem undesirable as a matter of policy. In particular,  
15 expanding the number of parties who can use § 506(c) would create  
16 the possibility of multiple administrative claims seeking recovery  
17 under the section. Each such claim would require inquiry into the  
18 necessity of the services at issue and the degree of benefit to the  
19 secured creditor. Allowing recovery to be sought at the behest of  
20 parties other than the trustee could therefore impair the ability of the  
bankruptcy court to coordinate proceedings, as well as the ability of  
the trustee to manage the estate . . . Further, where unencumbered  
assets were scarce, creditors might attempt to use § 506(c) even  
though their claim to have benefited the secured creditor was quite  
weak. The possibility of being targeted for such claims by various  
administrative claimants could make secured creditors less willing to  
provide postpetition financing. Id. at 12-13.

21 **2.**

22 **THE APPLICATION SHOULD BE DENIED INsofar AS IT REQUESTS IMMEDIATE**  
23 **PAYMENT OF PACIFIC MEAT COMPANY'S 503(b)(9) CLAIM**

24 The Court should **not** grant the Application, insofar as it seeks **payment** of Pacific  
25 Meat Company's 503(b)(9), Claim for a myriad of reasons. First, as was noted in the Arts and  
26 Bookbinder decisions cited above, there is no requirement in the Bankruptcy Code that claims  
27 asserted under section 503(b)(9) be paid immediately.

28 ///

1 Second, for this Court to order payment of Pacific Meat Company's 503(b)(9) Claim,  
2 as well as potentially other 167 claims in this category which total approximately \$8,500,000,  
3 would be contrary to the longstanding and well established priority scheme under the Bankruptcy  
4 Code whereby claims of secured creditors are entitled to be first in a Chapter 11 case, before  
5 unsecured creditors are paid in full, as was recognized by the Court in the Arts decision.

6 Third, there is no compelling reason why the 503(b)(9) Claim of Pacific Meat  
7 Company should be paid now, as there is no evidence that has been submitted by either the Debtor  
8 or Pacific Meat Company that it is a "critical vendor" to the Debtor. Moreover, it is undisputed that  
9 Pacific Meat Company continues to do substantial business with the Debtor, in that the Debtor  
10 recently purchased and paid for approximately \$164,000 of product sold to it by Pacific Meat  
11 Company. **In addition, the Debtor's bankruptcy case is over five weeks old and the Debtor has**  
12 **managed to continue to operate in Chapter 11 notwithstanding the fact that it has not made a**  
13 **single payment to any creditor asserting claims under section 503(b)(9).** Therefore, any  
14 argument which Pacific Meat Company may make that the payment of all section 503(b)(9) claims  
15 is essential to the viability of the Debtor post-petition rings hollow.

16 Fourth, the United States Supreme Court in the Hartford decision recognized that  
17 unsecured administrative claims cannot be paid from a secured creditor's collateral.

18 Fifth, the Debtor has not achieved its projected revenues for the last several weeks,  
19 after it filed its Chapter 11 case. In light of the foregoing, it would be inappropriate for this Court to  
20 order immediate payment of Pacific Meat Company's 503(b)(9) Claim, since for the Court to do so,  
21 would also "open the flood gates" for the payment of approximately \$8,500,000 of 167 other such  
22 alleged claims which apparently exist. The Application contains no analysis of how the Debtor's  
23 financial condition, with its sales having been approximately \$4,700,000 less on a cumulative basis  
24 than was projected to date, will be impacted by a requirement that it immediately pay over  
25 \$8,500,000 in claims. The Debtor's own forecast indicates it will have burned through cash of  
26 approximately \$4,100,000 between September 1 and October 6, 2013.

27 Sixth, the Debtor has projected that it will have an ending cash balance on October 6,  
28 2013 of only \$6,470,784. This is approximately \$2,104,000 less than the amount of

1 section 503(b)(9) claims which the Debtor estimated existed in the Procedures Motion. Clearly, if  
2 the Court granted the Application and also allowed other section 503(b)(9) claims to be paid, the  
3 Debtor would not have sufficient cash to make payment on all of these claims and the Debtor's  
4 bankruptcy case could collapse due to administratively insolvency.

5 Seventh, ordering payment of the 503(b)(9) Claim asserted by Pacific Meat  
6 Company would be inappropriate at the time in light of the fact that the Debtor owes to the Bank an  
7 amount in excess of \$26,000,000, which may be the subject of an avoidance action. In this early  
8 stage of the Debtor's bankruptcy case, having unsecured pre-petition administrative creditors paid in  
9 full, before the Bank's claims against the Debtor are satisfied, is clearly inappropriate and contrary  
10 to the principles underlying the Bankruptcy Code.

11 Finally, among the factors the Court must consider to determine whether claims  
12 asserted under section 503(b)(9) must be paid immediately are whether the estate may be able to  
13 pay all of its administrative expenses in full and the length and expense of a bankruptcy case's  
14 administration. By the time the hearing is held on the Application, the Debtor's bankruptcy case  
15 will be less than 60 days old. This Court itself has noted that the Debtor's bankruptcy case will be a  
16 very expensive case in terms of expenses of administration, and the Debtor, pursuant to the recent  
17 cash collateral budget approved of by the Bank at the interim cash collateral hearing held on  
18 August 28, 2013, has budgeted professional fee payments to its counsel, financial advisor, and  
19 counsel for the Committee of Unsecured Creditors **of \$320,000 for the approximate one month**  
20 fiscal period ending October 6, 2013. In light of these administrative expenses which the Debtor  
21 needs to pay for a single month, it is also inappropriate for this Court to grant Pacific Meat  
22 Company's Application for payment of its 503(b)(9) Claim now.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

CONCLUSION

For the foregoing reasons, the Application should be denied.

DATED: August 30, 2013

JEFFER MANGELS BUTLER & MITCHELL LLP  
ROBERT B. KAPLAN, P.C.  
NICOLAS DE LANCIE

By: /s/ Robert B. Kaplan  
ROBERT B. KAPLAN, ESQ.  
Attorneys for Secured Creditor WELLS FARGO  
BANK, N.A.